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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,
Petitioner,

v.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF PETITIONER

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 486 F.2d 863. The Decision and Order of the National Labor Relations Board, which was reviewed by the Court of Appeals, is reported at 197 NLRB No. 127. The Decision and Determination of Dispute of the National Labor Relations Board, which is the Board's determination of a union jurisdictonal dspute, is reported at 191 NLRB 828.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1973 (A. 72). Thereafter, a rehearing was sought which was denied by the Court of Appeals on November 26, 1973 (A. 73). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), the Petition for a Writ of Certiorari having been filed within ninety (90) days after the Court of Appeals' denial of rehearing.

STATUTES AND REGULATIONS INVOLVED

The following sections of the Labor Management Relations Act (L.M.R.A.), 29 U.S.C. § 151 *et seq.* are applicable to this case and are appended verbatim to the Petition: § 8(b)(4)(D), § 10(f) and § 10(k). The following pertinent sections of the L.M.R.A. are appended verbatim to the Brief: § 10(b), § 10(j) and § 10(l). The following sections of the Administrative Procedure Act (A.P.A.), 5 U.S.C. § 500 *et seq.* are applicable and are appended verbatim to the Petition: § 551(6), § 551(7), § 554, § 556 and § 557. Section 101.34 of the National Labor Relations Board's Statements of Procedure, 29 C.F.R. § 101.34 is applicable to this case and is appended verbatim to the Petition.

QUESTIONS PRESENTED

1. Whether a jurisdictional dispute proceeding under § 10(k) of the Labor Management Relations Act must be conducted in accordance with the provisions of the Administrative Procedure Act applicable to adjudications.

2. Whether the subsequent prosecution of the unfair labor practice case by the same N.L.R.B. attorney who presided at the prior § 10(k) hearing violated the Administrative Procedure Act's proscription of commingling prosecutorial and decisional functions.

STATEMENT OF THE CASE

Upon a charge filed by ITT-CESD on December 3, 1970, a hearing was held in March, 1971, before a duly designated hearing officer of the National Labor Relations Board (hereinafter designated as "Board"). This hearing was conducted under § 10(k) of the Labor Management Relations Act, 29 U.S.C. § 160(k), for the purpose of receiving facts concerning competing work jurisdiction claims by Local 134, International Brotherhood of Electrical Workers (hereinafter designated as "Local 134") and the Communications Workers of America (hereinafter designated as "CWA").

The hearing officer was not an administrative law judge (formerly designated as trial examiner) and the hearing was conducted in accordance with the Board's long-standing Statements of Procedure for the handling of such cases, 29 C.F.R. § 101.34, providing for a hearing, "non-adversary in character" for which "the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board." As is further provided in the Board's Statements of Procedure, at the close of the hearing, the case was transmitted to the Board for decision with an analysis prepared by the hearing officer but without any recommendation by him in regard to the resolution of the dispute.

Local 134 raised no objection at the hearing, nor in its brief to the Board, to the conduct of the hearing by a hearing officer, as opposed to an administrative law judge; to its inability to submit recommended findings to the hearing officer; or to the failure of the hearing officer to render a recommended decision. In short, no procedural objections premised upon the provisions of the A.P.A. applicable to "adjudications" were raised by Local 134 at any stage of the § 10(k) proceeding.

The Board issued its Decision and Determination of Dispute on June 30, 1971, wherein it awarded the disputed work to employees of ITT-CESD represented by the CWA, rather than to employees of other employers, represented by Local 134 (A. 9).

Following the refusal of Local 134 to comply with the Board's jurisdictional award, a complaint against Local 134 issued, alleging a violation of § 8(b)(4)(D) of the L.M.R.A., and a § 10(b) hearing was held thereon before an Administrative Law Judge, in accordance with the Board's Statements of Procedure, 29 C.F.R. § 101.36. At this adversarial hearing, the attorney who prosecuted the case on behalf of the Board's General Counsel, was the same individual who had previously presided at the § 10(k) hearing as the hearing officer. However, Local 134 raised no objection during the hearing before the Administrative Law Judge to this Board attorney's prosecution of the § 8(b)(4)(D) unfair labor practice. The first objection raised by Local 134 concerning a violation of the A.P.A. was presented in its brief to the Administrative Law Judge and complained for the first time that the same attorney who had presided at the § 10(k) hearing should not have prosecuted the unfair labor practice case.

Neither the Administrative Law Judge nor the Board, commented upon Local 134's belated objection premised on the A.P.A. The Administrative Law Judge's decision and recommended order was issued on February 7, 1972, finding that Local 134 had violated § 8(b)(4)(D) (A. 34). On June 22, 1972, the Board issued its Decision and Order affirming the findings of the Administrative Law Judge (A. 51).

Thereafter, Local 134 petitioned the Court of Appeals for the Seventh Circuit to review and set aside the

Board's Decision and Order, and the Board cross-petitioned for enforcement pursuant to 29 U.S.C. § 160(e) (A. 56, 60).

On September 20, 1973, the Court of Appeals issued its Order denying enforcement of the Board's Decision and Order. The Court of Appeals did not disturb the Board's jurisdictional award but rather found that:

> "Testimony at the § 10(k) hearing clearly indicates that employees represented by CWA customarily install and test equipment similarly to that involved here in Cook County and the Board determined that by area, employer, and industry practice, and by skill and training, the CWA employees were more entitled to perform the disputed work than employees of Local 134." (486 F.2d at 865). (A. 66).

The Court of Appeals also did not disturb the Board's findings and conclusions in the subsequent unfair labor practice proceedings. Specifically, the Court of Appeals held that:

> "[ITT-CESD] was coerced by Local 134 in an attempt to have the work assigned to employees the Local represents. In these circumstances the employer was 'trapped' in a jurisdictional dispute between the two contesting unions. . . . Such is the very activity § 8(b)(4)(D) was intended to prohibit." (486 F.2d at 866). (A. 67-68).

The basis for the Court of Appeals' denial of enforcement of the Board's Order, was that the individual who acted as the hearing officer in the § 10(k) proceeding was not an administrative law judge pursuant to 5 U.S.C. § 556 and also that the same person later acted as the prosecutor of the unfair labor practice complaint. On these facts, the Court of Appeals concluded that there had been a commingling of prosecutorial and decisional functions in violation of § 554 of the A.P.A.

SUMMARY OF ARGUMENT

The Seventh Circuit has held that "both the spirit and the letter" of § 554 of the A.P.A. require that § 10(k) proceedings under the L.M.R.A. be conducted in accordance with the A.P.A. provisions applicable to "adjudications". According to its decision, a § 10(k) hearing must be conducted by an administrative law judge as required by § 556; and the administrative law judge must render a recommended decision as required by § 554(d) and § 557. The recommended decision of the administrative law judge, determining a jurisdictional dispute, would then, according to the Seventh Circuit, be reviewable by the Board and, without an unfair labor practice proceeding, become a final agency order subject to judicial review.

In so holding, the Seventh Circuit has failed to recognize the Congressional intent underlying enactment of the A.P.A. as well as the reasons for enactment of § 10(k) of the L.M.R.A. Analysis of § 554, as well as its legislative history clearly shows it is applicable only to accusatory proceedings involving a prosecutorial function. In enacting the A.P.A., Congress was primarily concerned that in proceedings involving "adjudications" and leading to a final agency order, that the prosecutorial and decisional functions would be handled by different persons completely independent of one another. Congress also felt strongly that hearing examiners should render the initial decision in these accusatory proceedings, and that their decisions be rendered completely free of supervision by any person directly under the authority of the agency which would finally pass on their initial decisions.

The Congressional intent reflected in the A.P.A. is that the scheme for these accusatory proceedings is that the hearing, or trial, would lead directly to the examiner's initial, independent decision, followed by review

of that decision by the agency without further evidentiary hearings, and that the order then issued would be judicially reviewable.

When the legislative history of the L.M.R.A. is viewed against the backdrop of the A.P.A.'s legislative history, it becomes clear that Congress did not intend § 10(k) proceedings to be adjudications within the A.P.A.'s meaning. The L.M.R.A.'s legislative history reflects that the passage of § 10(k) and related sections 8(b)(4)(D), 10(j) and 10(l), were intended to be an interlocking statutory scheme designed to quickly end jurisdictional strikes. It was Congress' objective to protect the public and employers from the economic havoc caused by the prolongation of such strikes. Section 10(k) as well as sections 10(j) and 10(l) were merely intended to be additional procedures, ancillary to an accusatory proceeding under § 8(b)(4)(D), in order to achieve this objective. This is supported by a significant omission from § 10(k) of provisions of the Senate's original version of that section which provided for the Board's appointment of arbitrators to hear jurisdiction disputes, and which made awards of such arbitrators final and judicially reviewable. These provisions in the Senate version were dropped in conference with the House. From their omission it can be inferred that the Senate was persuaded that final and judicially reviewable § 10(k) determinations, in light of § 10(j) and § 10(l), were unnecessary to achieve the Congressional purpose of quickly resolving the cause of jurisdictional strikes. It was hoped that the § 10(k) procedure would resolve the dispute precisely because such a resolution would avoid the time consuming processes of a Board hearing and adjudication, followed by judicial enforcement.

A consideration of both the legislative history of the A.P.A. and the L.M.R.A. leads to the conclusion that Congress did not intend § 10(k) proceedings to be ad-

judications within the meaning of § 554. This Court's decision in *N.L.R.B. v. Plasterers' Union No. 79*, 404 U.S. 116 (1971) clearly acknowledged that a § 10(k) decision is not binding on any party (even the striking union), and that the award is not an order. We ask the Court in the case at bar to logically extend its *Plasterers'* decision and hold that such a non-binding decision which does not constitute an order is, therefore, not an "adjudication" within the intendment of the A.P.A.

The Congressional purposes for the enactment of the A.P.A. and the L.M.R.A. one year later must be accommodated so as to preserve to each the essential goals for which they were enacted. The only reasonable basis for such an accommodation is to construe § 10(k) determinations as essentially the same kind of proceedings as § 9 representation proceedings, which are expressly exempted from the class of adjudications under § 554. Such a construction does not unduly strain the "certification of worker representatives" exemption in § 554(a)(6). A determination of dispute and Board award of work under § 10(k) is, in effect, a certification of which worker representative's members should perform disputed work. The only distinguishable feature between resolutions of worker certification under § 9 and resolutions of work disputes under § 10(k) is that the latter proceeding is triggered by a strike or a threat of a strike by one of the competing unions. Both types of proceedings are non-accusatory, do not involve a prosecution for any statutory violation, and neither result in a binding order. In both, the facts gathered are generally undisputed and relate to the kind of work performed by designated groups or classes of employees, bargaining history, the organizational structure of the employer's business, and other economic facts from which the Board determines the appropriate unit for bargaining or the appropriate union or group to which work should be assigned. Both § 9(c)

and § 10(k) hearings are held to elicit the same kind of evidence; neither results in an order of the Board; and neither, therefore, should be conducted as an adjudication.

Rather than accommodate the purposes of both statutes, the Seventh Circuit's decision has created an irreconcilable conflict between the two (2) and has also totally emasculated the essential purpose for § 10(k)'s enactment. The net result of the decision below is that a jurisdictional award is a final order of the Board as that term is used in the A.P.A., notwithstanding that Congress has provided that it is not an order under the L.M.R.A. If it is an order under the A.P.A., it is subject to judicial review; however, if it is not an order under the L.M.R.A., it is not subject to judicial review. If it is subject to judicial review, a court of appeals would render a pronouncement on the propriety of the Board's determination of which union is to perform the work but any non-compliance would only result in the prosecution of an unfair labor practice complaint, producing another adjudication, another order, and possibly another review in the court of appeals. Such an extraordinary and time-consuming process is an absurdity which this Court, under its established principles of statutory interpretation, should not allow to prevail.

The Seventh Circuit's decision overturns the Board's consistent procedure for the resolution of jurisdictional disputes and its interpretation that § 10(k) determinations are not adjudications. This procedure, embodying the Board's interpretation, was established contemporaneously with the passage of § 10(k) in 1947 and was unchallenged in court until the case at bar and *Bricklayers, Masons and Plasterers International Union of America* v. *N.L.R.B.*, 475 F.2d 1316 (C.A.D.C., 1973). The Board's interpretation of its statutory mandate under § 10(k) is entitled to great weight.

The factual basis which caused the Seventh Circuit to deny enforcement of the Board's order in this case was the prosecution of the unfair labor practice complaint against Local 134 by the same Board attorney who had conducted the prior § 10(k) hearing. Even if a § 10(k) hearing is not literally an adjudication within the meaning of § 554 of the A.P.A., the Court of Appeals has held that the spirit of subsection 554(d) was violated by a commingling of prosecutorial and decisional functions. In so holding, however, the Seventh Circuit has misconceived the nature of the § 10(k) hearing and the hearing officer's role. The hearing officer does not share any decisional authority with the Board in a jurisdictional dispute determination. He makes no recommended decision. Even if conducting the hearing is construed to be decisional, the prosecution does not occur until after the § 10(k) determination, and the hearing officer could not foresee that he would subsequently prosecute the case because the Board normally assigns a different attorney to prosecute. The most serious misconception of the Court of Appeals is its impression that the hearing officer is engaged in the preparation of the prosecution while he presides at the § 10(k) hearing. The Court of Appeals likened the hearing officer's role to that which was denounced by the Court in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950), as improper commingling of functions by a presiding inspector in deportation proceedings. A § 10(k) hearing, however, is completely dissimilar to a deportation hearing, the latter being an accusatorial proceeding wherein the presiding inspector has the duty of making the case as strong as is necessary to support the charges against the alien. In a § 10(k) hearing, the hearing officer does not have a duty, nor is he even allowed, to fashion a case for or against one union over the other.

There is no claim of any prejudice or impropriety which Local 134 suffered by reason of any of the viola-

tions of the A.P.A. found by the Seventh Circuit. In fact, Local 134 never raised an objection to the same attorney prosecuting the complaint until it filed its brief with the Administrative Law Judge, long after the hearing had ended and the record in the case was closed.

ARGUMENT

The Court Of Appeals Decision Requires That Jurisdictional Dispute Hearings Under § 10(k) Be Conducted By Administrative Law Judges And Makes Determination Of Such Disputes By The Board A Final Appealable Order Subject To Judicial Review.

The issue in this case is essentially the same as that presented to the Court of Appeals for the District of Columbia in *Bricklayers, Masons & Plasterers International Union of America* v. *N.L.R.B.*, 475 F.2d 1316 (C.A.D.C., 1973). There the Board determination of dispute under § 10(k) was claimed by the Bricklayers Union to be improper because it had been made without a recommended decision of a trial examiner. The Union contended that a recommended decision was required "in every case of adjudication required by statute to be determined on the record after an opportunity for an agency hearing. . ." (5 U.S.C. § 554(a)). The court held that a § 10(k) determination is not an adjudication within the meaning of § 554 and Judge Fahy, speaking for the court, framed the issue by saying:

> ". . . only if a section 10(k) determination is an adjudication within the meaning of section 554 would a recommended decision have been required." (*Id.* at 1318)

The Seventh Circuit, contrary to the holding of the District of Columbia Circuit in the *Bricklayers* case, held that a § 10(k) determination is an "adjudication" within the meaning of that term as used in § 554 of the Administrative Procedure Act. It based its decision on

the fact that because the hearing officer in the § 10(k) proceeding subsequently prosecuted the unfair labor practice complaint in a § 10(b) hearing, there occurred a violation of "both the spirit and the letter" of § 554(d) of the Administrative Procedure Act (A. 71). This section of the A.P.A., among other things, bars the commingling of adjudicatory and prosecutorial functions. In holding this section applicable to § 10(k) proceedings under the L.M.R.A. the Court of Appeals concluded that such proceedings constitute an "adjudication" as that term is used in subsection 554(a) of the A.P.A.

Section 554 of the A.P.A. is applicable, as it states, only to a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ." Except for those matters excluded by subsections 554(a)(1)-(6), such adjudications are required by other provisions of § 554, § 556 and § 557 to be conducted in accordance with stated procedural safeguards. Subsection 554(d) relates to the separation of decisional and prosecutorial functions and mandates that the agency employee presiding at the reception of evidence "shall make the recommended decision or initial decision" and refers to § 556 which requires that such person be a hearing examiner appointed under § 3105. Subsection 556(c) also prescribes the duties and responsibilities of such examiners and § 556(d) sets out the rights of the parties in the presentation of their cases before hearing examiners. Subsection 554(d) also refers to § 557 which requires examiners to make initial decisions (unless the matter is certified to the agency) and provides for appeals to the agency from examiners' initial decisions leading to a final agency order.

The statutory scheme of the A.P.A. is that a § 554 proceeding is *quasi judicial* in nature since it is an adjudication leading to final agency action. Moreover, the initial hearing contemplated by this section is the

initiation of a proceeding which, without further evidentiary proceedings, leads to final agency action and an appealable order subject to judicial review. Thus, it is clear that the Court of Appeals' holding that § 10(k) proceedings are adjudications within the meaning of § 554 of the A.P.A., if allowed to stand by this Court, leads to a twofold result. First, all § 10(k) determinations must henceforth be conducted by hearing examiners, now known as administrative law judges. Second, the determination of jurisdictional disputes by the Board will result in what the Court of Appeals deems to be final agency orders, directly appealable to courts of appeals, without the Board having made a decision on the merits of an alleged unfair labor practice under § 8(b)(4)(D).

It is submitted that the decision of the Court of Appeals is erroneous since it is contrary to the legislative intent of the Administrative Procedure Act as well as the Labor Management Relations Act. Support for this position is found not only in decisions of this Court in *N.L.R.B.* v. *Plasterers' Union No. 79*, 404 U.S. 116 (1971) and the District of Columbia Circuit in *Bricklayers, Masons & Plasterers International Union of America* v. *N.L.R.B.*, 475 F.2d 1316 (C.A.D.C., 1973), but also in the legislative histories of both statutes.

Legislative History Of The A.P.A. Shows That Adjudicative eHarings Under § 554 Are Limited To Accusatory Proceedings Involving A Prosecution.

The question of statutory interpretation before the Court is whether a § 10(k) determination is such an "adjudication required by statute [L.M.R.A.] to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—. . . (6) the certification of worker representatives" (§ 554 (a)(6)). A literal reading of § 10(k) does not provide a conclusive answer for it simply states in relevant part that:

> "[T]he Board is empowered and directed to hear and determine the dispute . . ."

Standing alone it is unclear from this quoted portion of § 10(k) whether Congress has directed a determination of the jurisdictional dispute on the record after opportunity for agency hearing.[1] A proper resolution of the question will, therefore, require resort to the legislative intent of both the A.P.A. and L.M.R.A., as determined by the congressional purpose for the enactment of both statutes as a whole and the legislative intent regarding particular provisions of those statutes.

The Administrative Procedure Act was drafted for the specific purpose of classifying the activities of administrative agencies, providing basic procedures for the conduct of those activities, and establishing provisions for judicial review of agency orders. The legislation was purposefuly drafted on a functional approach, not specifying any particular agency or naming any specialized agency process. The Report of the House Committee on the Judiciary contains the following explanation:

> "Functional classifications and exemptions have been made, but in no part of the bill is any agency exempted by name. The bill is meant to be operative 'across the board' in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (See sec. 2(a)). Where an agency has shown that some par-

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[1] *Compare, United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973) and *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), wherein this Court decided that § 556 and §557 of the A.P.A. were not applicable to a certain class of Interstate Commerce Commission rule-makings even though the Interstate Commerce Act provided for such rule-making "after hearing". The Court reasoned that because the language did not specifically contain the phrase "on the record after opportunity for agency hearing", that Congress had not intended § 556 and § 557 to apply.

> ticular operation should be exempted from any particular requirement, the same function in all agencies has been exempted." (Senate Judiciary Comm., The A.P.A. LEGISLATIVE HISTORY, H.R.Rep. No. 1980, 79th Cong., 2nd Sess., at 250, (1946) (hereinafter cited as The A.P.A. LEGISLATIVE HISTORY)).

Senator McCarran, the Chairman of the Senate Judiciary Committee, reported the bill (S. 7) out of his committee to the Senate and stated the general purpose and intent of the legislation as follows:

> "I cannot emphasize too strongly that the bill now before the Senate is not a specification of the details of administrative procedure. Neither is it a codification of administrative law. It represents, instead, an outline of minimum basic essentials, framed out of long consideration and in the light of the comprehensive studies I have previously mentioned.
>
> To state it simply, this bill is designed to afford parties affected by administrative powers a means of knowing what their rights are, and how they may be protected. At the same time, administrators are provided with a simple course to follow in making administrative determinations. The jurisdiction of the courts is clearly stated. The bill thus provides for public information, administrative operation, and judicial review." (93 Cong. Rec. 2151) (1946).

The statute reflects an effort to classify all agency action into two (2) types—legislative (or rule-making) and adjudicative—even though some particular agency actions were not amenable for classification into either category. Consequently, functional exemptions, such as the exclusion of "the certification of worker representatives" were carved out of the class of "adjudications" (§ 554(a)(6)).

Section 551(7) defines adjudication as "agency process for the formulation of an order." Order is defined as

"the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making, but including licensing;" (§ 551(6)). Construing these two definitions together, an adjudication is literally any agency process for the formulation of a final disposition of a matter other than rule-making. These conclusionary definitions, however, do not, standing by themselves, adequately describe the kinds of proceedings which Congress set out to define as adjudications, for as the Senate Judiciary Committee Report stated:

> "The definitions in Section 2 are important, but they do not indicate the scope of the bill since the subsequent provisions make many functional distinctions and exceptions." (The A.P.A. LEGISLATIVE HISTORY, at 194).

Further statements from the legislative history disclose that the term adjudication was intended by Congress to encompass only accusatory proceedings against a person charged with violating a statutory proscription. Carl McFarland, a member of the Attorney General's Committee which initially drafted and proposed legislation leading to the Administrative Procedure Act, made this very clear in his testimony before the Senate Judiciary Committee. In reference to § 554 he said:

> "Now, to repeat, there are two kinds of administrative operations, the legislative operation called rule making which we have discussed, and *adjudication which is sometimes called an accusatory procedure.* That is a procedure where an agency comes forward and points its finger to a given person or to a company and says, 'You have sinned and we will proceed to try you'." (The A.P.A. LEGISLATIVE HISTORY, at 78) (emphasis added).

The Senate Judiciary Committee accepted McFarland's view that the term "adjudication" as used in § 554(a)

relates only to an accusatory proceeding. A Senate Judiciary Committee print contained the following statement concerning the reason for including subsection (d) in § 554:

> " 'The first sentence of subsection (c)[2] is designed to assure, in so-called 'accusatory' proceedings, that those who hear the case shall participate in its decision'." (*Id.* at 24).

In the same print the Senate Committee further indicated that § 554 contemplated accusatory proceedings because it would include a prosecutorial function, completely divorced from the adjudicative function. Thus, the Senate Judiciary Committee's print includes the following explanation of its reasons for subsection 554(d):

> " 'The remainder of the subsection, [referring to everything following the first sentence] in such cases, is designed to achieve an 'internal' segregation of deciding and prosecuting functions. The minority of the Attorney General's Committee took the position that there should be a complete separation of functions—that is, that hearings should be held and decisions made by an administrative tribunal separate from the agency engaged in investigations and prosecutions, or by a court. (Final Report, pp 203-209). The majority however, took the position that, while 'a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions' and the 'commingling of functions of investigation or advocacy with the function of deciding are . . . plainly undesirable,' the situation could and should be remedied by appropriate internal division of labor.' " (*Id.* at 24-25).

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[2] This subsection in the Bill became subsection (d) of Section 554 as finally passed.

Later in its report the Senate Committee reiterated its intention that § 554(d) is not only intended to separate prosecutorial and adjudicative functions, but also contemplates a prosecutor in adjudicative hearings covered by § 554(a). The Report states:

> "The gist of the subsection [554(d)] is that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers, except as a participant in public proceedings and even then in no different fashion then the private parties or their representatives." (*Id.* at 203).

The legislative history of the A.P.A. on the House side also manifests an intent that § 554 involved an accusatory proceeding wherein someone is prosecuted for a statutory violation, and that such prosecution is intended to be separate from the decisional function. During House debates, Congressman Gwynne, a member of the House Judiciary Subcommittee, commenting on S. 7 and referring to subsection 554(d) said:

> "An important feature of the bill in this connection has to do with the appointment of examiners and there is a provision to keep the deciding functions separate and distinct from the prosecution part of it. Great complaint has been made that agencies send out people to prosecute the individual and, from the same office and subject to the same direction, they send out the hearing examiner who is to hear the case. This provides for separation of these functions and prohibits one from meddling with the other." (93 Cong. Rec. 5656) (1946).

In the same debate Congressman Robison made the following comment, consistent with that of his colleague:

> "This bill recognizes the principles on which our three branches of government are based so that the prosecutor may not get up the evidence, prosecute

the case, and, at the same time, decide the case." (93 Cong. Rec. 5660) (1946).

It is clear from the foregoing excerpts from Congress' deliberations on the A.P.A. in 1946, that the term adjudication was intended to apply only to accusatory proceedings involving a prosecution. The pivotal point of this case is, of course, the nature of the proceedings governed by § 554. An examination below of the legislative history of § 10(k) and related provisions passed in 1947, as amendments to the National Labor Relations Act, discloses that Congress did not intend § 10(k) proceedings to be adjudications within the meaning of § 554. That history reveals, rather, that Congress deemed § 10(k) proceedings to be preliminary, investigative, non-accusatory proceedings without the presence of a prosecuting officer.[3]

The Congressional Purpose For Enacting § 10(k) Was To Avoid A § 554 Accusatory Proceeding.

Section 10(k) empowers and directs the Board "to hear and determine" jurisdictional disputes, "unless, within ten days after notice that such charge has been

[3] Section 101.33 of the Board's Statements of Proceedure (29 CFR § 101.33) indicates that the only parties to a 10(k) proceeding are "parties to the dispute out of which the unfair labor practice is said to have arisen." No provision is made in § 10(k) for the Board's prosecutor, its General Counsel, to appear in 10(k) hearings. Moreover, the Board has recognized its General Counsel plays no role in 10(k) proceedings for in § 102.90 (29 CFR 102.90) and §§ 102.64 through 102.68 (29 CFR §§ 102.64-102.68) of its Rules and Regulations he is not mentioned. Furthermore, this Court, in *N.L.R.B. v. Plasterers' Union No. 79*, 404 U.S. 116, (1971) held that the proper parties in a 10(k) proceding include the unions vying for disputed work as well as affected employers. Conversely, § 101.10 (29 CFR § 101.10) of the Board's Statements of Procedure which references unfair labor practice hearings under § 10(b), describes the role of its prosecutor as follows: "The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint."

filed, the parties to such dispute shall submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Section 10(k) was added to the legislation in the Senate. No comparable provision had been included in the original House bill, H.R. 3020 (H.R. Rep. No. 510 on H.R. 3020, 80th Cong. 1st Sess. 57 (1947)). The Senate Committee on Labor and Public Welfare stated the reason for its inclusion was the Committee's conviction that "additional procedures," especially in jurisdictional disputes, were needed, going beyond provisions defining union unfair labor practices. The Committee stated that these additional procedures "must be made available under the National Labor Relations Act in order to adequately protect the public welfare which is inextricably involved in labor disputes." (S.Rep. No. 105 on S.1126, 80th Cong., 1st Sess. 8 (1947)).

In order to adequately protect the public from what this Court has called "the economic havoc of jurisdictional strikes," *N.L.R.B.* v. *Plasterers' Union, supra* at 128, the Senate Committee said it had included the additional procedures of § 10(k) because "[t]ime is usually of the essence in these matters" (S.Rep. No. 105, at 8). Thus it provided for what it clearly intended to be a preliminary additional procedure for resolving jurisdictional disputes, other than the unfair labor practice procedure under § 8(b)(4)(D). The reason for providing these additional means was Congress' great concern for the expeditious resolution of jurisdictional disputes, rather than leaving their resolution to more time consuming unfair labor practice proceedings. The Committee Report explained:

> "Time is usually of the essence in these matters, and consequently the relatively slow procedure of the Board hearing and order, followed many months later by an enforcement decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining." (*Id.* at 8).

Not only did the Senate add § 10(k) as one of the "additional procedures" beyond the provisions defining union unfair labor practices, it also added § 10(j) and § 10(l), authorizing the Board to seek in district courts injunctive relief against jurisdictional strikes, pending its adjudication of claimed violations of § 8(b)(4)(D). The Senate Committee's Report states that these ancillary injunctive relief provisions were included due to the same consideration, namely urgency in stopping jurisdictional strikes, which led it to include § 10(k). Its comment on these additional procedures reads as follows:

> "[W]e have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices." (*Id.* at 8).

The foregoing taken from the legislative history of the 1947 amendments to the N.L.R.A. clearly shows that § 10(k) was only one of a number of "additional procedures", designed by Congress as a preliminary means, ancillary to § 10(b) unfair labor practice hearings, designed to eliminate, as expeditiously as possible, the harm to the public interest caused by jurisdictional strikes. In devising this truncated procedure Congress deliberately reserved for unfair labor practice hearings,

adjudications on the merits of alleged violations of § 8 (b) (4) (D). It is only in unfair labor practice hearings under § 10(b) that the prosecution—and hence an adjudication—takes place. In such hearings the Board's General Counsel, pursuant to § 3(d) of the Act exercises his authority "in respect of the prosecution of [unfair labor practice] complaints."

The legislative history of the enactment of § 10(k) clearly demonstrates that Congress sought to achieve a twofold purpose—that the Board would resolve which union should perform the work prior to any unfair labor practice proceeding, and that such resolution would be accomplished quickly. Congress was aware of the "regular procedure of the Board for hearing and judicial enforcement" (93 Cong. Rec. 1846) (1946) which necessitated an accusatory proceeding leading to an order of the Board, and purposefully chose that such disputes would be resolved in an ancillary, non-accusatory proceeding which did not result in an order of the Board. An adjudication must await the subsequent issuance of a complaint triggering a § 10(b) hearing wherein an allegation of a violation of 8(b)(4)(D) is urged by a prosecuting officer. It is this latter proceeding which constitutes an adjudication within the meaning of § 554.

The non-binding, preliminary hallmarks of a § 10(k) proceeding are illustrated by the language of the statute. There is a different quantum of proof required under § 10(k) and § 10(b). In the former the standard of proof is "reasonable cause to believe" a charge alleging a violation of 8(b)(4)(D) is true, and in the latter the standard of proof is that such charge must be established by a "preponderance of the testimony" (§ 10(c)). This Court recognized this significant distinction in *N.L.R.B.* v. *Plasterers' Union, supra.* Justice White, addressing the different burdens of proof in these two types of proceedings, observed at footnote 10 on page 122 that:

> "[T]o exercise its powers under § 10(k), the Board need only find that there is reasonable cause to believe that a § 8(b)(4)(D) violation has occurred, while in the § 8(b)(4)(D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated § 8(b)(4)(D)."

It can be thus be inferred that Congress, by providing for a lesser quantum of proof in § 10(k) hearings than that required in a § 10(b) unfair labor practice hearing, manifested an intent that the former type hearing is merely a preliminary, ancillary proceeding which does not, without an additional evidentiary hearing of a different nature, lead to a final agency determination and order—the essential element of a § 554 adjudication according to the legislative history of the A.P.A.

Mr. Justice White, writing for the Court in *Plasterers'*, succinctly pointed out the preliminary and non-adjudicatory nature of § 10(k):

> "The § 10(k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse 10(k) decision, the Board must prove the union guilty of a § 8(b)(4)(D) violation before a cease-and-desist order can issue. The findings and conclusions in a 10(k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8(b)(4)(D) determination [citations omitted]. Both parties may put in new evidence at the § 8(b)(4)(D) stage. . ." (*Id.* at 122 n.10).

From the Court's perception of § 10(k) proceedings referenced in *Plasterers'*, it is but a short distance to the ultimate conclusion we urge herein, namely, that such a proceeding does not constitute an adjudication within the meaning of § 554. In order to reach this conclusion, resort again to the legislative history is helpful. Congress established a *quasi-judicial* administrative system, which

(1) leads from an evidentiary hearing; (2) to initial decision; (3) to final agency determination resulting in a final judicially reviewable order. Congress intended that the type of proceeding envisioned by § 554 was limited to that in which the evidence presented at *one hearing* (not in additional hearings) would result in an order imposing a sanction,[4] as in other prosecutions wherein there is an adjudication of guilt.

As noted above, this Court has recognized that a § 10(k) determination binds no one.

> "But the § 10(k) decision standing alone, binds no one. No cease and desist order against either union or employer results from such a proceeding; . . . Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10(k) decision." (404 U.S. at 126-127) (footnote omitted).

It logically follows from what this Court has said, that a § 10(k) determination is not a process for the formulation of an order and thus it does not constitute an adjudication within the meaning of § 554. Reference again to the legislative history of § 10(k) is helpful.

The Senate version of § 10(k) in S. 1126 also contained an amendment offered by Senator Morse for the Board's appointment of an arbitrator to hear the merits of

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[4] In *N.L.R.B.* v. *Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 576-577 (1961), this Court noted it was Congress' intent in passing § 10(k) to avoid sanctions following unfair labor practice proceedings: The Court said at pp. 576-577:

> "[W]hen Congress created this new type of unfair labor practice by enacting § 8(b)(4)(D) as part of the Taft-Hartley Act in 1947, it also added § 10(k) to the Act. Section 10(k), set out below, quite plainly emphasizes the belief of Congress that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions."

jurisdictional disputes, within ten (10) days of the service of notice of the filing of a charge. In offering such an amendment, he too had expressed the view that in jurisdictional disputes time is of the essence, "and the regular procedure of the Board for hearing and judicial enforcement did not remedy the evil sought to be corrected" (93 Cong. Rec. 1846) (1946). The Senate Committee accepted the amendment of Senator Morse and also added the following as the last sentence in the original Senate version of § 10(k):

> "The award of an arbitrator shall be deemed a final order of the Board" (S.Rep.No. 105 on S.1126, supra, at 8).

The Senate Committee in referring to its acceptance of the Morse Amendment and the foregoing sentence said in its Report:

> "[W]e have provided that the Board shall be authorized to appoint arbitrators to hear and determine jurisdictional disputes concerning work tasks, if the parties fail to adjust the disputes within ten (10) days. Pursuant to this authorization, arbitration awards are to have the same force as final orders of the Board." (*Id.* at 8).

In the following excerpt from its Report, the Senate Committee further amplified the final order and appealable status of an arbitration award in jurisdictional disputes:

> "Finally, the award of the arbitrator is given the same status and force as a final order of the Board, a provision which will avoid the necessity of the Board hearing the dispute if it has designated an arbitrator for that purpose and also *will permit the Board to seek enforcement of the award without further proceedings.*" (*Id.* at 27) (emphasis added).

When S. 1126 was submitted to joint conference, however, both Senator Morse's arbitrator appointment pro-

vision as well as the final order language added by the Senate Committee, were omitted (H.R.Rep. No. 510 on H.R. 3020, supra, at 57). As this Court noted at page 129 of its opinion in *N.L.R.B.* v. *Plasterers' Union, supra*—this was done without explanation. However, the reasons for deletion of the provision can fairly be determined from a consideration of Congress' purpose in enacting § 8(b)(4)(D), § 10(k), § 10(j) and § 10(l).

The reasons for the Senate's retreat from including arbitration under § 10(k) and making awards final orders, while not appearing in the legislative history, are nevertheless patent from considering the overall purpose of the 1947 Amendments. Both Houses of Congress were concerned with adopting means for quickly stopping jurisdictional strikes. The Senate's original concern in inserting § 10(k) into the legislation and the reasons for it expressed in the Senate Committee Report for providing arbitration having the effect of a final order, was that it was initially believed, at least in the Senate, that a final arbitral award was necessary in order to achieve this objective without awaiting the traditional and time consuming procedures of the Board under the unfair labor practice provisions. With respect to its reasons for the inclusion of final and binding arbitration, the Senate referred to "the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals" (S.Rep. No. 105 on S. 1126, supra, at 8). However, with the passage of §§ 10(j) and (l) providing for ancillary injunctive relief from jurisdictional strikes and designed to maintain the *status quo ante* while the Board, through its unfair labor practice proceeding determines, in due course, alleged violations of 8(b)(4)(D), the Senate was obviously convinced by House conferees that interim arbitration, having the effect of a final appealable order, was superfluous. In other words, deletion of the arbitration

and final order provisions from the Act as passed, manifests a Congressional intent that § 10(k) determinations do not constitute final appealable orders contemplated by the A.P.A. The decision of the Seventh Circuit below, has in effect written into the statute the finality of § 10 (k) determinations, which Congress deliberately omitted as being superfluous in view of the injunctive remedies available under § 10(l).

Section 10(k) Proceedings Are Analogous To § 9 Representation Proceedings.

At the time Congress enacted the A.P.A. in 1946, the Board engaged in two (2) non-rule making activities—the resolution of questions concerning representation under § 9 of the N.L.R.A. and the prevention of unfair labor practices under § 8. The two (2), however, are quite different in character, as is clearly demonstrable from the language and structure of the statute. This Court held in *American Federation of Labor* v. *NLRB*, 308 U.S. 401 (1940), that unfair labor practice proceedings result in an "order" reviewable by courts of appeals, but that certifications in representation proceedings are not reviewable orders. In its opinion, this Court noted Congress' deep concern that representation proceedings not be delayed by judicial review of the Board's representation determinations and concluded that:

> "The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms." (*Id.* at 409).

The legislative history of § 554(a)(6) of the A.P.A., excluding "the certification of worker representatives" from that statute's requirements for "adjudications", reflects the same Congressional concern for the avoidance of delay in representation cases. The Senate Judiciary

Committee stated that the basis for the exclusion was that ". . . such things as intermediate reports, findings, and written decisions are unnecessary because of the simplicity of the issues, the great number of cases, and the exceptional need for expedition." [5] (The A.P.A. LEGISLATIVE HISTORY, at 23).

The functional similarity between § 9 proceedings and § 10(k) proceedings is obvious. The purpose of a § 9 proceeding is to determine questions concerning representation of workers and the purpose of a § 10(k) proceeding is to determine which competing group of workers should perform the work.[6] While the ultimate question of representation under § 9 is generally resolved by an election, in many cases the Board must resolve disputed issues concerning the appropriateness of the bargaining unit. In such cases it hears evidence concerning the work performed by designated groups or classes of employees; bargaining history; the nature and organizational structure of the employer's business; the size of the employer's facility or facilities; as well as other relevant factors showing a community of interest among

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[5] The Attorney General's Committee on Administrative Procedure reported that "[t]he need for intermediate reports, to the extent that they provide a method for obtaining the judgment of the trial examiner on issues of fact dependent for their resolution upon the demeanor of witnesses, is rarely present in a representation proceeding. The evidentiary material relates to economic facts such as the nature of the employer's business, the duties of certain employees, and the history of collective bargaining in the plant. Issues of credibility are rarely present." (S. Doc. No. 10, 77th Cong., 1st Sess., pt. 5, at 35, n. 144 (1944)).

[6] As this Court noted in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268 (1963), there is a ". . . blurred line that often exists between work assignment disputes and controversies over which of two or more unions is the appropriate bargaining unit." If it is a work assignment dispute, then § 10(k) is operative, assuming there has been a strike or threat of a strike. If the controversy concerns which of two unions should represent the employees performing the work, a § 9 proceeding to clarify the certification is held.

employees as to their wages, hours and terms and conditions of employment.

The Board's task in a § 10(k) determination requires the same fact gathering, analysis, and application of standards and criteria, as is necessary in a § 9 proceeding.[7] The relevant factual inquiries in a jurisdictional dispute determination concern the bargaining history of one or both unions (including collective bargaining agreement); industry and area practice; relative skills of the employees; efficiency of operation; and past practices. As in the case of § 9 unit determinations, these factual matters are generally not disputed as such and the Board's determination is based upon an examination of those facts in accordance with relevant criteria.

Neither the § 10(k) determination nor the § 9 representation proceeding result in "orders" of the Board. The reasons Congress chose to exclude § 9 cases from the A.P.A. provisions relating to adjudications are the same, in part, as the reasons for which it enacted § 10 (k) one year later—i.e. (1) the desire for a relatively fast procedure for resolving questions of representation or work jurisdiction, (2) in non-accusatory proceedings, (3) with non-reviewable decisions of the Board, (4) based upon the application of pre-determined standards.[8]

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[7] In *Plasterers'*, *supra*, at 135, the Court characterized a § 10(k) proceeding as "a comparative proceeding aimed at determining which union is entitled to perform certain tasks."

[8] The House Conference Report on The Taft-Hartley Act indicates that Congress construed representational and jurisdictional questions as somewhat interlocking, as follows:

> "(19) The Senate amendment also contained a new Section 10(k) which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine disputes between unions giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes). The conference agreement contains this provision of the Senate amendment, amended to omit the authority to appoint an arbitrator. If the employer's employees select as their bar-

The District of Columbia Circuit clearly recognized the functional similarities between § 9 cases and § 10 (k) proceedings and concluded that the latter were not adjudications for the same reasons as were applicable to the former (*Bricklayers, supra*, at 1319).[9] We believe the District of Columbia Circuit's analysis is correct and that it further demonstrates that Congress could not have intended that the certification of work tasks would be an adjudication if the "certification of worker representatives" was not an adjudication.

The Seventh Circuit's Decision Creates An Irreconcilable Conflict Between the L.M.R.A. And The A.P.A.

In sharp contrast to the District of Columbia Circuit's decision in *Bricklayers*, the Seventh Circuit has determined that a § 10(k) determination is an adjudication under § 554 and that the requirements of that and related sections of the A.P.A. are applicable to such proceedings. In so holding, the Seventh Circuit has completely overturned the Congressional purpose of speedily resolving jurisdictional disputes and thereby avoiding a protracted "adjudication".

Under the Seventh Circuit's decision § 10(k) determinations, which are not overly quick under the present procedure,[10] would suffer significant additional delays

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gaining agent the organization that the Board determines has jurisdiction, and if the Board certifies that union, the employer will, of course, be under the statutory duty to bargain with it." (H.R.Rep. 510 on H.R. 3020, supra, at 57).

[9] The Court's actual statement is ". . . because of the similarity between the nature of a section 9 representation proceeding and a proceeding under section 10(k). An intermediate report by the examiner is not required in the former for reasons applicable to the latter:"

[10] Over six (6) months transpired between the filing of the charge in the instant case and the Board's determination of the dispute.

because the case would first have to await assignment of an administrative law judge, then allow for time to submit proposed findings and conclusions, and finally file exceptions to the recommended decision of the administrative law judge (§ 557(c)).

Even more destructive of Congressional intent than the lengthening of the time internal to the Board's handling of a jurisdictional dispute, is the potential for drastic delays which may result from the superimposition of the A.P.A.'s definition of "adjudication" and "order" on the Board's § 10(k) decision after it is finally rendered. If the § 10(k) proceeding is an adjudication, then the jurisdictional award is an "order" rendered by the Board after a hearing conducted by an administrative law judge. That order must, under § 551(6), be a "final order" and therefore may be reviewed by a court of appeals under § 10(f) of the L.M.R.A. (29 U.S.C. § 160(f)).[11] This circumstance would create teh absurd situation of a jurisdictional "order" being enforced or set aside by a court of appeals, after which, if it were enforced, an entirely new adjudication of the unfair labor practice would result with another hearing before an administrative law judge, another "order" of the Board, and, if necessary, another review by a court of appeals.

The Seventh Circuit's decision creates an irreconcilable conflict between the language and intent of the statutory scheme for the resolution of jurisdictional disputes and the provisions of the A.P.A. While Congress has clearly provided that a jurisdictional award is not an order under the L.M.R.A., the Seventh Circuit has held, in

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[11] That section provides in part that "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business. . .".

effect, that it is an order under the A.P.A. Under long-standing principles of statutory construction applied by this Court, the Seventh Circuit's construction of these statutes cannot be allowed to stand.

In *Sorrells* v. *United States*, 287 U.S. 435, 446 (1932), the Court stated that:

> "Literal interpretation of status at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned."

In *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) the Court noted that the construction of statutes "so as to avoid results glaringly absurd, has long been a judicial function". *See, also, United States* v. *American Trucking Ass'n.*, 310 U.S. 534, 543 (1940), wherein the Court stated:

> "When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (footnotes omitted);

and *Southland Co.* v. *Bayley*, 319 U.S. 44, 47 (1943),

> "The problem of statutory construction posed by this conflict of circuits should not be solved simply by a literal reading of the exemption section of the Fair Labor Standards Act and the delegation of power section of the Motor Carrier Act. Both sections are parts of important general statutes and their particular language should be construed in the light of the purposes which led to the enactment of the entire legislation."

The Seventh Circuit's decision has applied the literal definition of adjudication in the A.P.A. to § 10(k) pro-

ceedings, clearly producing an absurd result which is not mandated by the policy and intent of the A.P.A. and which is completely contrary to the policy and intent of the L.M.R.A.'s procedures for the expeditious resolution of jurisdictional disputes.

The Board's Long-Standing And Consistent Treatment Of § 10(k) Determinations As Non-Adjudicatory Is Entitled To Great Weight.

From the time § 10(k) was enacted in 1947, the Board has consistently conducted § 10(k) proceedings in the same manner as it has conducted § 9 proceedings—i.e., with hearing officers rather than independent trial examiners, without proposed findings, and without exceptions. As early as 1949, specific challenge to the Board's § 10(k) procedure as violative of provisions of the A.P.A. relating to adjudications was raised and the Board stated as follows:

> "The Respondents assert that Section 8 [§ 557] of the Administrative Procedure Act applies to a proceeding under Section 10(k) of the National Labor Relations Act, as amended. We do not agree. Under Section 202.32 of the Board's Rules and Regulations —Series 5, as amended, the hearing under Section 10(k) is non-adversary in character, and, according to the procedure adopted therefor, conducted in the same way as a hearing in a representative proceeding. The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 of the Administrative Procedure Act applies."

(*Marine Cooks & Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341, 341 (1949)).

To the same effect is the Board's holding in *International Longshoremen's & Warehousemen's Union (General Ore, Inc.)*, 124 NLRB 626 (1959).

The Board's interpretation that the statutory scheme for the resolution of jurisdictional disputes is not adjudicative until unfair labor practice liability is litigated, was rendered contemporaneously with the enactment of § 10(k) and should be given great weight by this Court as a guide to statutory interpretation. In *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315 (1933), Mr. Justice Cardozo said:

> "[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore*, 95 U.S. 760, 763; *Logan* v. *Davis*, 233 U.S. 613, 627; *Brewster* v. *Gage*, 280 U.S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U.S. 375; *Interstate Commerce Comm.* v. *New York, N.H. & H.R. Co.*, 287 U.S. 178, ante, 248. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

For more recent applications of this interpretive principle, see *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965), where the Court stated: "The interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute"; and *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), stating: "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."

Not only has the Board consistently treated § 10(k) proceedings as non-adjudicatory since that provision became law in 1947, but also the Board's interpretation has impliedly been accepted by courts of appeals and even this Court in past decisions construing the meaning and purpose of § 10(k), although no court has specifically passed upon this question until the District of Columbia and Seventh Circuits' 1973 decisions. The District of Columbia Circuit specifically noted in this regard that:

> "[W]e are faced with an unusually impressive administrative interpretation supporting the conclusion we reach, first adopted by the Board as long ago as 1949. . . . and until now, we believe, not questioned by courts or Congress. This interpretation of section 10(k) by the Board is entitled to great weight." (*Bricklayers*, *supra*, at 1321) (citations omitted).

The Prosecution Of The Unfair Labor Practice Case By The Same N.L.R.B. Attorney Who Presided At The Prior § 10(k) Hearing Was Not An Improper Commingling Of Prosecutorial And Decisional Functions.

There remains only the question of whether the A.P.A.'s proscriptions against the commingling of prosecutorial and decisional roles were violated "in spirit" if not in the letter of the statute because the same Board attorney conducted the § 10(k) hearing and subsequently prosecuted the § 8(b)(4)(D) complaint.[12] In this respect, the Seventh Circuit held:

> "In our case the hearing officer had the duty of hearing the evidence in the case, and subsequently urging and relying upon it as prosecutorial evidence.

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[12] We note, in passing, that if there was a violation of the A.P.A., such spiritual violation was so ethereal as to escape the notice of Local 134 until it filed its brief to the administrative law judge, long after the Board's § 10(k) determination, and even after the close of the unfair labor practice hearing.

> We think that the knowledge on the part of the presiding officer that he will subsequently advocate a position based upon his own evidentiary rulings at the § 10(k) hearing could very well influence his decisions at that hearing. This commingling of functions is plainly inconsistent with both the spirit and the letter of the Act, and, we think, incompatible with the accepted norms for proper administration of justice." (A. 70-71).

This holding of the Seventh Circuit is premised upon several factual errors. First, the hearing officer did not play a judicial or decisional role in the § 10(k) hearing, but rather acted as an administrative fact gatherer. He shares no decisional authority with the Board but merely "prepares an analysis of the issues and the evidence" and "makes no recommendations in regard to resolution of the dispute" (29 CFR § 101.34). In *International Longshoremen's and Warehousemen's Union, supra,* at 629, the Board described the hearing officer's role as follows:

> "The primary function of the hearing officer, who is acting under delegation of authority from the Board, in a nonadversary proceeding is to insure that the record contains a full statement of pertinent facts as may be necessary for the determination of the dispute by the Board."

Secondly, the hearing officer had no knowledge that there would be a subsequent unfair labor practice proceeding. Certainly, he could not have foreseen that he would prosecute it. In fact, the Board does not ordinarily assign the same person to conduct related § 10(k) hearings and § 8(b)(4)(D) unfair labor practice cases.

The most fundamental error in the Seventh Circuit's holding is the Court's apparent concept that the hearing officer is engaged in mixed functional roles at the § 10(k) hearing itself, i.e. that he is hearing the evidence

and at the same time using that opportunity to get a running start on his prosecutorial tasks. This being the case, the Court has reasoned, the evil is within the purview of the statement of the Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service, 77 (Mimeo. 1940) quoted in part in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 44 (1950) and also set out in the Seventh Circuit's decision (A. 69-70) as follows:

> "A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible. Nor is complete divorce between investigation and hearing possible so long as the presiding inspector has the duty himself of assembling and presenting the results of the investigation. . . ." [13]

Wong Yang Sung concerned deportation proceedings (clearly an accusatorial proceeding) conducted by the Immigration Service wherein the responsibility of the "presiding inspector" was notably prosecutorial because he had the duty to conduct the interrogation of the alien, to cross examine the alien's witnesses, and to "present such evidence as is necessary to support the charges in the warrant of arrest" (339 U.S. at 46).

We submit that the hearing officer's role in a § 10(k) hearing is completely dissimilar to that of a presiding inspector of the Immigration Service which was decried by this Court in *Wong Yang Sung* as being violative of the A.P.A. proscription against commingling. As noted previously, the § 10(k) hearing is not accusatory, and furthermore, the hearing officer is neither required nor allowed to build a case for or against either

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[13] The Seventh Circuit erroneously attributed this statement to Mr. Justice Jackson. (A. 69).

union claiming entitlement to the work in question. As this Court noted in *Plasterers'*, *supra*, note 7, the hearing is "a comparative proceeding aimed at determining which union is entitled to perform certain tasks." The hearing officer has no functional motivation to favor either union in the reception of the evidence and has no "responsibility of appraising the strength of the case" nor "of seeking to make it as strong as possible" (*Wong Yang Sung*, *supra*, at 44).

Quite clearly there was no violation of the A.P.A.'s commingling proscription in fact or spirit in this case. Indeed, Local 134 has not alleged that any facts or findings of the Board, in either the § 10(k) determination, or the unfair labor practice proceeding, demonstrated that it was prejudiced by the hearing officer's functioning as the prosecutor in this case. There is no claim of any actual impropriety or prejudice. As noted previously, Local 134 never even raised an objection.

CONCLUSION

It is respectfully submitted that the Seventh Circuit's decision holding that § 10(k) proceedings are adjudications, within the meaning of § 554 of the A.P.A., constitutes reversible error. Its sole basis for denying enforcement of the Board's Decision and Order was the finding of an improper commingling of prosecutorial and adjudicative functions. As to the merits, the Seventh Circuit found that the Board's determination of dispute and its subsequent unfair labor practice adjudication, were otherwise proper and supported by substantial evidence on the record. We therefore ask that this Court enter an order reversing the decision of the Court of Appeals and enforcing the Decision and Order of the National Labor Relations Board. In the alternative we ask that the decision be reversed as to the administrative law point, and that the case be remanded to the Seventh Circuit with instructions for the entry of an order and decree enforcing the Board's order.

Respectfully submitted,

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APPENDIX

APPENDIX

LABOR MANAGEMENT RELATIONS ACT OF 1947

* * * *

§ 160. Prevention of Unfair Labor Practices

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any

such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

* * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, peti-

tion any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged n promotng or protecting the interests of employee members. The serv-

ice of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).





JUN 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

vs.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT CWA IN SUPPORT OF PETITIONER.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT CWA IN SUPPORT OF PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 486 F. 2d 863 (7th Cir. 1973), App. 63-71. The Decision and Order of the National Labor Relations Board which was reviewed by the Court of Appeals is reported at 197 NLRB No. 127 (1972); App. 51-55. The Decision and Determination of Dispute of the National Labor Relations Board, which is the Board's determination of the underlying jurisdictional dispute, is reported at 191 NLRB No. 122 (1971), App. 9-24.

JURISDICTION.

This case is before the Court pursuant to 28 U. S. C. § 1254(1), a petition for writ of certiorari having been granted by order of May 13, 1974.

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Board's determination of a jurisdictional dispute under § 10(k) of the Labor Management Relations Act is a final order and consequently within the reach of § 554 of the Administrative Procedure Act.

2. Whether the hearing officer in a § 10(k) jurisdictional dispute case before the National Labor Relations Board participates or advises in the decision to such an extent that he is subject to § 554(d) of the Administrative Procedure Act.

3. Whether Local 134 waived its right to claim that § 554 (d) of the Administrative Procedure Act applied to the proceedings before the Board by failing to object to obvious departures from other sections of that Act at the outset of the § 10(k) hearing, or by failing to appeal from the Board's determination of the § 10(k) dispute.

4. Whether there was a commingling of judicial and prosecutorial functions which violated § 554(d) of the Administrative Procedure Act where an attorney acted as hearing officer in a hearing under § 10(k) of the Labor Management Relations Act, and months later was assigned to prosecute a related unfair labor practice case.

STATUTES AND REGULATIONS INVOLVED.

The following sections of the Labor Management Relations Act (LMRA), 29 U. S. C. § 151, *et seq.* (1970), are applicable to this case and are appended verbatim to this petition as Appendix 1:

§ 3(d)	29 U. S. C. § 153(d) (1970)
§ 8(b)(4)(ii)(D)	29 U. S. C. § 158(b)(4)(ii)(D) (1970)
§ 10(a)	29 U. S. C. § 160(a) (1970)
§ 10(e)	29 U. S. C. § 160(e) (1970)
§ 10(f)	29 U. S. C. § 160(f) (1970)
§ 10(j)	29 U. S. C. § 160(j) (1970)
§ 10(k)	29 U. S. C. § 160(k) (1970)
§ 10(l)	29 U. S. C. § 160(l) (1970)

The following sections of the Administrative Procedure Act (APA), 5 U. S. C. § 551, *et seq.* (1970), are applicable and are appended verbatim as Appendix 2:

§ 551(6) and (7)	5 U. S. C. § 551(6) and (7) (1970)
§ 554(d)	5 U. S. C. § 554(d) (1970)
§ 556(a) and (b)	5 U. S. C. § 556(a) and (b) (1970)

Section 101.34 of the National Labor Relations Board's Statements of Procedure, 29 C. F. R. § 101.34 (1973), is applicable to this case and is appended verbatim as Appendix 3.

STATEMENT OF THE FACTS AND OF THE CASE.

Statement of the Facts.

The Communications Equipment and Systems Division of International Telephone and Telegraph Corporation (the Employer or the Company) entered into a contract with the Village of Elk Grove, Illinois, to sell and install a private telephone system for the Elk Grove Village administration offices which were under construction.[1] The Employer subcontracted the initial phase of this work to an electrical construction company whose employees were represented by Local 134, International

1. The facts are stated here as found by the Board and by the Court of Appeals. Since Local 134 has not cross-appealed to this Court, there is no issue of fact at this time.

Brotherhood of Electrical Workers, AFL-CIO (Local 134). The bulk of the work was to be accomplished by employees of the Employer who are represented for collective bargaining purposes by the Communications Workers of America (CWA).

A business agent of Local 134 objected to this work assignment, telling officials of the Employer that Local 134 did all telephone and private switchboard installation and maintenance work in Cook County, Illinois. The business agent stated that CWA would not install telephone equipment in Cook County and that "[W]e'd better get that work or there will be trouble."

When employees of the Employer represented by CWA appeared at the job site to begin their work, the Local 134 steward and other members of Local 134 employed by other contractors left the job site and remained away from their work until the Employer agreed that no CWA employees would remain on the job. Thereafter, CWA employees were excluded from the job site. Only after the members of Local 134 had completed their work were CWA employees able to return to complete the balance of their work.

PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD.

The Employer then filed an unfair labor practice charge alleging that Local 134 had violated Sections 8(b)(4)(i) and (ii)(D) of the National Labor Relations Act (hereafter Labor Management Relations Act or LMRA), 29 U. S. C. § 158(b)(4)(i) and (ii)(D). The gravamen of the unfair labor practice charge was that Local 134 threatened the Employer and induced employees of other, neutral employers to refuse to work for the purpose of forcing the Employer to assign particular work to members of Local 134 rather than to Company employees represented by CWA.

After investigating the charge, the Board held a hearing under § 10(k) of the LMRA. This hearing was presided over by an

attorney who was an employee of the regional office of the Board and who was designated to act as a hearing officer. Upon conclusion of the hearing the record was transferred to the Board. In accordance with practice before the Board in § 10(k) hearings, no briefs were filed with the hearing officer, but only with the Board. The Board, after receiving briefs filed by the parties, issued its detailed Decision and Determination of Dispute. App. 9. The Board awarded the disputed work to employees of the Company represented by CWA. App. 21. Thereafter a motion to reconsider was filed by Local 134 which was denied. Local 134 did not contend during any phase of the § 10(k) proceeding that the APA was applicable, nor did it raise any objection claiming a violation of the APA. Local 134 did not attempt to appeal to the Court of Appeals from the Decision and Determination of Dispute.

The second phase of the matter before the Board consisted of an unfair labor practice proceeding, based upon the original charge which had lain dormant during the § 10(k) proceedings. When Local 134 indicated that it would not abide by or accept the Board's decision in the § 10(k) proceeding, the General Counsel issued a Complaint, charging that an unfair labor practice had been committed.

The attorney assigned to represent the General Counsel and to prosecute the unfair labor practice, by chance, turned out to be the same attorney who had presided as hearing officer at the § 10(k) hearing eight months earlier. At the outset of the unfair labor practice hearing, Local 134 objected and for the first time argued that the Administrative Procedure Act (APA) applied. The objection was based solely on the grounds that the same attorney who had previously been the hearing officer in the § 10(k) hearing was now acting as prosecutor.

The unfair labor practice hearing was held before an Administrative Law Judge (then called a Trial Examiner). After briefs were submitted, the Judge determined that Local 134 had indeed committed the unfair labor practice. App. 34. On appeal, the Board affirmed. App. 51.

PROCEEDINGS IN THE COURT OF APPEALS.

Thereafter Local 134 filed a petition to review the Board's order, and the Board filed a petition seeking enforcement.

The Court of Appeals for the Seventh Circuit affirmed most of the Board's Decision. It affirmed the Board's award of the work in the § 10(k) decision:

> "Testimony at the § 10(k) hearing clearly indicates that employees represented by CWA customarily install and test equipment similar to that involved here in Cook County, and the Board determined that by area, employer, and industry practice and by skill and training, the CWA employees were more entitled to perform the disputed work than employees of Local 134." App. 66.
>
> "We certainly cannot say that the Board's decision was not supported by the controlling facts of the case." App. 68.
>
> "In these circumstances the employer was 'trapped' in a jurisdictional dispute between the two contesting unions. Stated another way, the Local 134 activities complained of did not involve a primary dispute with the employer over fulfillment of its contract for work customarily performed, but were secondary pressures designed to influence the employer concerning a jurisdictional union dispute. Such is the very activity § 8(G)(4)(D)(b)(4)(D) was intended to prohibit." App. 67-68.

Even though it agreed that Local 134 had violated the Act, the Court of Appeals denied enforcement of the Board's decision. The court concluded that, because the hearing officer in the § 10(k) proceeding subsequently served in a prosecutorial capacity at the § 8 unfair labor practice hearing, there was a violation of § 5(d) of the APA. 5 U. S. C. § 554(d). On this basis the court denied enforcement of the Board's order.

SUMMARY OF ARGUMENT.

Congress sought to regulate jurisdictional disputes by enacting § 10(k) of the Labor Management Relations Act. Under the scheme of the Act, there is no provision for immediate enforcement of the Board's decision in a § 10(k) proceeding. The only way to implement the § 10(k) decision is through an unfair labor practice hearing, after which, as here, the Board may seek enforcement or any party may seek to review the Board's order. Consequently, the § 10(k) decision is not final. If it is not final, it is not, by definition, an adjudication under the Administrative Procedure Act, and § 554(d) of the APA does not apply. Since the court below relied upon § 554(d)'s proscription against commingling of judicial and prosecutorial functions, its refusal to enforce the Board's order was error.

A further reason why § 554 of the APA does not apply to the hearing officer in a § 10(k) proceeding is because he merely presides over a non-adversary, fact-gathering hearing. He does not participate in or advise in the decision of the Board. Consequently his function is not regulated by § 554(d) of the APA which by its terms affects only prosecutors who participate or advise in the decision. In the present case the Board alone determined the jurisdictional dispute; the hearing officer did not in any way participate in the decision or advise the Board.

If the court below is upheld, then the settlement of jurisdictional disputes would be delayed, in contravention of the desire of Congress to expedite such settlements. The APA applies only if the § 10(k) decision is a final one. But, if it is final, an appeal would have to be allowed at that point, pursuant to § 10(f) of the LMRA. This would allow not one but two appeals to a disappointed party, thereby greatly delaying conclusion of the jurisdictional dispute.

Local 134 has waived its right to assert that the proceedings below were governed by the APA, since Local 134 did not object at the time of the § 10(k) hearing on the grounds that

the hearing officer was not an Administrative Law Judge and on the grounds of other departures from the APA (§§ 556, 557). Also Local 134 did not appeal from the Board's § 10(k) decision, which it had a right to do if the decision was final, as now claimed.

Even if we assume, *arguendo*, that § 554(d) of the APA applies and prevents a person who operates on the level of a § 10(k) hearing officer from also performing prosecutorial functions, Local 134 was not prejudiced. Since the hearing officer at the time of the § 10(k) hearing did not know that he would later be a prosecutor, his role as hearing officer or judge was impartial. The APA seeks to guarantee an impartial judge, not to regulate prosecutors. Since the hearing officer here was impartial, there was no prejudice to Local 134 and no reason to deny enforcement of the Board's order.

ARGUMENT.

I. Since the Board's § 10(k) Determination Was Not Final, It Was Not an Adjudication, and, Therefore, § 554 of the APA Does Not Apply.

The Court of Appeals agreed with the Board that Local 134 had violated the Act, but the court refused to enforce the Board's order on a highly technical ground based upon a misreading of the Administrative Procedure Act. The Court of Appeals relied upon a crucial but unwarranted assumption:

> "It is apparently admitted that § 554 [of the APA] applies to [LMRA] § 10(k) hearings." App. 70.

This assumption was crucial, because it largely decided the case. It was unwarranted, because neither the Employer, the Board, nor CWA had ever made this admission. Although these three parties called this mistake to the court's attention by filing petitions for rehearing, the petitions were denied without further opinion. This issue is too important to be decided by an admission which was never made.

Section 554 of the APA does not apply to all agency proceedings. It only "applies, according to the provisions thereof, in every case of adjudication. . . ." 5 U.S.C. § 554(a) (1970). An adjudication is defined as agency process for the whole or a part of a "final disposition." APA § 551(6), (7). It is clear, however, that the § 10(k) decision under the LMRA is not a final disposition. This Court explicitly pointed this out in *NLRB* v. *Plasterers Union No. 79*, 404 U.S. 116 (1971):

> "But the § 10(k) decision standing alone, binds no one. No cease-and-desist order against either union or employer results from such a proceeding. . . ." 404 U.S. at 126.

Obviously, if the § 10(k) decision binds no one, it is not a final decision and not an "adjudication" that would be subject to the APA. Nevertheless, the Court of Appeals, while acknowledging this Court's language in the *Plasterers* case, proceeded to brush it aside in order to arrive at the erroneous conclusion that § 554 is applicable to a § 10(k) proceeding. The Court of Appeals, notwithstanding this Court's language, thought it "an over-simplification to say that the § 10(k) hearing has no binding effect." App. 69. This is a play on words. A decision that binds no one cannot have significant binding effect. More important, a decision that binds no one should not be considered final under the APA.

A decision which is directly contrary to that of the court below was reached in *Bricklayers, Masons and Plasterers* v. *NLRB*, 475 F.2d 1316 (D.C. Cir. 1973), where, in a carefully reasoned decision, the United States Court of Appeals for the District of Columbia held "that a determination in a Section 10(k) proceeding is not an adjudication within the meaning of 5 U.S.C. Section 544." 475 F.2d at 1318-19. The applicability of the APA was the major point at issue there, and the opinion of the District of Columbia Circuit is devoted almost entirely to analyzing this problem and concluding that the APA does not apply. By contrast, the Seventh Circuit in the case at bar assumed incorrectly that this crucial point was "admitted."

The District of Columbia Circuit expressly held that even though a factual question is resolved, the § 10(k) decision is not final.

> "The scheme for and consequence of a Section 10(k) hearing thus are not adjudicatory, notwithstanding that in reaching its determination the Board resolves a factual issue. That may be the case also in a Section 9 representation proceeding but would not for that reason require an intermediate report of the hearing officer, even were such a certification not explicitly excepted from Section 554 of the A.P.A." *Id.*, at 1321.

Clearly a § 10(k) decision is not an adjudication and, therefore, does not fall within the scope of the APA.

The § 10(k) decision "binds no one." *NLRB* v. *Plasterers Union No. 79, supra,* at 126. It does not result in a cease and desist order. "Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10(k) decision . . ." *Id.* at 127. The "impact of the § 10(k) decision is felt in the" unfair labor practice proceeding. *Id.* at 126. "This is the design of the Act; Congress provided no other way to implement the Board's § 10(k) decision." *Id.* at 127.[1] A decision which binds no one, whose impact is not felt until an entirely separate proceeding and a subsequent decision in such a proceeding, and which cannot itself be implemented, is not final. As it was not final, § 554 of the APA did not apply and it was not violated. Clearly, in resolving the conflict between the Seventh Circuit and the District of Columbia Circuit, this Court should uphold the District of Columbia, as its decision rests upon a firm foundation of correct statutory

1. The absence of any enforcement procedure indicates that the § 10(k) determination is not final. Like the § 10(k) hearing, a public hearing called by the Secretary of HEW under the Clean Air Act, 24 U.S.C.A. § 1857d(h), does not result in any sanctions for failure to comply with the Board's order. Consequently it has been held that such a hearing is not an "adjudication" subject to the APA. *U.S.* v. *Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968).

construction and greater understanding of the statutory scheme of Congress for the resolution of jurisdictional disputes.

II. Even if, Arguendo, § 554(d) of the APA Applied, It Was Not Violated Because the Hearing Officer Below Did Not Participate or Advise in the Decision.

A. The Board, Not the Hearing Officer, Decided the Case. This Was in Accordance with Board Rules and Long-Established Precedent.

Section 554(d), relied on by the court below, states that an agency employee who performs prosecuting functions may not also ". . . participate or advise in the decision, recommended decision, or agency review . . ." 5 U.S.C. § 554(d) (1970). This language does not apply to a § 10(k) hearing officer, since he does not participate or advise in the Board's decision.

The Board's rules state:

> "Sec. 101.34 Hearing—If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is *nonadversary* in character, and the *primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board.* All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted *to the Board for decision.* The hearing officer prepares an analysis of the issues and the evidence, *but makes no recommendations* in regard to resolution of the dispute." (emphasis added.) 29 C.F.R. 101.34 (1973).

The Board has consistently defined the role of the hearing officer so as to preclude his recommending, participating in, or advising in the § 10(k) decision. For instance, the Board stated:

> "The hearing under Section 10(k) is *non-adversary* in character and conducted in the same manner as a hearing in a representation proceeding. The *primary interest* of the hearing officer, who is acting under the delegation of authority from the Board, is *to insure that the record contains as full a statement of pertinent facts*, as may be necessary for a determination by the Board. *The hearing officer makes no recommendation* in regard to resolution of the dispute, and the charged unions in this case do not refer to any particular ruling of the hearing officer whereby they were prejudiced." (emphasis added). *Local No. 27, International Typographical Union*, 121 NLRB 1013, 1015-1016 (1958).

To the same effect is *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341, 24 LRRM 1089 (1949).

In *International Longshoremen's & Warehousemen's Union, Local 8 (General Ore, Inc.)*, 124 NLRB 626, 44 LRRM 1445 (1959), the Board reiterated the circumscribed duties of the hearing officer. The Board there noted in reference to another provision of the APA that "it is well established that Section 8 of the Administrative Procedure Act . . . does not apply to a proceeding under § 10(k)." 124 NLRB at 628, 44 LRRM at 1449. The Board described the limited authority of a hearing officer in these words:

> "However, a hearing officer's report in a 10(k) proceeding, as in all representation cases, is in the nature of an interoffice memo and is part of the Board's confidential files. As mentioned before, a hearing officer report contains no recommendations as to the disposition of the issues, nor is it intended to dispense with the independent review by the Board of all the evidence admitted at the hearing, or with the determination by the Board of all the issues raised by the parties at the hearing and in their briefs to the Board. Under Sections 9(c) and 10(k) of the Act, no such responsibility is imposed upon the Hearing Officer, but it is laid upon the Board." 124 NLRB at 629, 44 LRRM at 1449.

It is thus apparent that the hearing officer does not "participate or advise in the decision, recommended decision, or agency review" and that consequently § 554 of the APA does not apply.

The Board's policy is to utilize a hearing officer to preside over a non-adversary, fact-gathering hearing. But the Board itself makes the § 10(k) decision. This is in accord with the legislative aim:

> "But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. . . . But Congress, after discussion and consideration, decided to entrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board." *NLRB* v. *Radio and Television Broadcast Engineers Union, Local 1212,* 364 U.S. 573, 583 (1961).

In executing the responsibilities imposed upon it by Congress, the Board has isolated the hearing officer from the decision-making process.

The Court of Appeals for the District of Columbia in the *Bricklayers* case, 475 F.2d 1316 (D.C. Cir. 1973) felt that great weight should be accorded to the Board's long-standing, uniform interpretation of the Act, to the effect that the APA does not apply in § 10(k) matters:

> "Furthermore, we are faced with an unusually impressive administrative interpretation supporting the conclusion we reach, first adopted by the Board as long ago as 1949 in National Union of Maritime (*sic.*) Cooks and Stewards (Irwin Lyons Lumber Co.), *supra,* repeated in 1959 in

Local 8, Longshoremen (General Ore, Inc.), 124 N.L.R.B. 626, and until now, we believe, not questioned by courts or Congress. This interpretation of Section 10(k) by the Board is entitled to great weight. [Citation omitted.] It is noteworthy also that in neither NLRB v. Plasterers' Union, No. 79, *supra*, nor NLRB v. Radio & Television Broadcast Engineers Union No. 1212, 364 U. S. 573, 81 S.Ct. 330, 5 L.Ed.2d 302 (1961), was there a hearing officer's recommended decision in the Section 10(k) proceedings there involved, although, we must add, no question in that respect was raised."

B. In View of the Hearing Officer's Limited Authority, He Does Not Materially Influence the Decision.

The hearing officer's primary interest in the non-adversary § 10(k) proceeding is to ensure that the record contains all the pertinent facts. While he does make evidentiary rulings, the Board decides the case. Board Rules, 29 C.F.R. 101.34 (1973). The Board is interested in generally non-controvertible economic facts as illustrated by the Board's Decision and Determination of Dispute in this case. App. 9; 191 NLRB No. 122 (1971). The § 10(k) evidence concerned and the Board relied on such facts as the business of the Employer (App. 10), the labor organizations involved (App. 11), the background of the dispute (*Id.*), the certification and collective bargaining agreements (App. 16), area, employer and industry practice (*Id.*), the skills and training of employees (App. 18), the efficiency and economy of operations (App. 19) and other factors (App. 20).

Since such economic facts are, by and large, objectively verifiable, and since the hearing officer's rulings on evidence are subject to full review by the Board, the hearing officer's capability to influence the outcome of the proceeding, if he were so minded, is considerably less than the Court of Appeals conjectured.

In analogizing the § 10(k) proceeding to representation proceedings for the selection of a bargaining agent under § 9 of

the LMRA, the Court of Appeals in the *Bricklayers* case quoted from the Attorney General's Committee on Administrative Procedure in Government Agencies (Monograph No. 5, S. Doc. No. 10, 77th Cong. 1st Sess., Pt. 5, at 35 n. 141 (1941)) as follows:

> "The need for intermediate reports, to the extent that they provide a method for obtaining the judgment of the trial examiner on issues of fact dependent for their resolution upon the demeanor of witnesses, is rarely present in a representation proceeding. The evidentiary material relates to economic facts such as the nature of the employer's business, the duties of certain employees, and the history of collective bargaining in the plant. Issues of credibility are rarely present." (footnote omitted) 475 F.2d at 1319.

The D.C. Circuit then quoted with approval the following language from *National Union of Marine Cooks and Stewards (Irwin Lyons Lumber Co.)*, 83 NLRB 341 (1949):

> "The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 [Section 557] of the Administrative Procedure Act applies." 475 F.2d at 1320.

In light of the hearing officer's very limited role, he cannot be said to participate in the agency decision and, therefore, § 554(d) of the APA does not apply.

III. The Opinion Below Would Thwart the National Labor Policy Seeking Prompt Resolution of Jurisdictional Strikes.

If, as the court below assumed, the § 10(k) hearing is to be treated as an adjudication, then significant, time-consuming consequences would result. The APA requires that the presiding officer must be an administrative law judge (5 U.S.C. § 556(b)(3)), that he file a recommended or initial decision (5 U.S.C. §§ 554(d) and 557(a)), and that the parties have an opportunity to submit proposed findings of fact and conclusions of law prior to the recommended decision and exceptions to that decision (5 U.S.C. § 557(c)). None of these requirements is followed in current Board practice.

Since the result of an adjudication is the whole or a part of a "final disposition," 5 U.S.C. § 551(6), (7), the aggrieved party would also have to be permitted to appeal from the § 10(k) decision, for the LMRA provides that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals . . . ." LMRA § 10(f), 29 U.S.C. § 160(f) (1970).

It is obvious that these additional procedures and appeal would result in vastly increasing the time involved in resolving jurisdictional disputes, contrary to the intent of Congress in enacting § 10(k). In the present case, 17 months elapsed between the final decision of the Board in the unfair labor practice case (June 22, 1972) and the order of the Court of Appeals denying the petitions for rehearing (November 26, 1973) App. 2. If there were added to this the time required for proposed findings of fact or exceptions, plus the additional appeal from the § 10(k) decision, the present procedure would be extended for additional months or years while jurisdictional disputes would drag on.

As the Court of Appeals observed in the *Bricklayers* case:

> "In the first place there is need obviously, for as expeditious a resolution of the jurisdictional dispute as is reasonably possible." 475 F.2d at 1321.

The legislative history of § 10(k) supports this obvious conclusion. In enacting § 10(k) Congress departed from the statutory scheme of relying solely on unfair labor practice procedures to control undesirable conduct. To be sure, Congress established a new unfair labor practice in § 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D) (1970), but it did not stop there. It added § 10(k) for the purpose of expediting resolution of jurisdictional disputes.

The Senate report noted that "Time is usually of the essence in these matters. . . ." S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, Leg. Hist. 414. Thereafter, a provision in the Senate-approved bill to try jurisdictional disputes before an arbitrator was deleted. Instead, what are now LMRA §§ 10(j),(k) and (l) which include the availability of quick injunctive remedies were passed, 29 U.S.C. §§ 160(j), (k) and (l) (1970). Section 10(k) allows the parties only ten days to adjust or agree upon voluntary methods for adjustment, 29 U.S.C. § 160(k). Sections 10(j) and (l) allow injunctive relief by the Board "where such relief is appropriate" or "just." 29 U.S.C. §§ 160 (j) and (l). Thus Congress expected to provide "a rather quick and decisive remedy" for dealing with jurisdictional disputes. Senator Ellender in colloquy with Senator Morse, Leg. Hist. 1057-8.

The court below ignored the obvious consequences of its decision. To lengthen such proceedings by requiring an intermediate report, and by giving the aggrieved party two appeals to the Court of Appeals, one after the § 10(k) decision and one after the unfair labor practice decision, would defeat the Congressional goal of speed by unduly extending the time in which an employer would be subject to pressures from jurisdictional strikes.

IV. Local 134 Was Barred from Asserting in This Proceeding the Alleged Failure to Conform to the APA, Having Failed to Raise That Objection at Any Stage of the § 10(k) Hearing.

At no time during the § 10(k) proceedings did Local 134 contend that the APA was applicable. Yet, if § 554(d) were held to apply to the § 10(k) proceedings, then § 556 of the APA (5 U.S.C. § 556(a) (1970)) also would have to apply as the court below held, App. 70, and under that section the Board would have been required to appoint a Trial Examiner or Administrative Law Judge to conduct the hearing. Somewhat inconsistently the court below stated:

> "We assume that the § 10(k) hearing officer in this case is the equivalent of a hearing examiner for purposes of § 556, inasmuch as the statute so requires and no point was made of any distinction, either at the hearing or on appeal." App. 70, n. 3.

But this assumption of the court was incorrect. The record shows that the person who presided at the § 10(k) hearing was a regional office staff attorney designated as "hearing officer" and not a Trial Examiner or Administrative Law Judge as required by § 556 of the APA. Yet Local 134 never raised this objection at any time in the course of the § 10(k) proceedings. Local 134 should have urged the alleged APA violations before the Board at that time, and if the § 10(k) decision was final Local 134 should have at least attempted to appeal to the Court of Appeals.

The LMRA states:

> "No objection that has not been urged before the Board, its members, agent or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e) (1970).

This Court has spoken unequivocally and clearly:

> ". . . [O]ur cases have uniformly held that in the absence of a showing within the statutory exception of 'extraordinary circumstances' the failure or neglect of the respondent to urge an objection in the Board's proceedings forecloses judicial consideration in enforcement proceedings." *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961).

It is therefore clear that Local 134 is foreclosed from raising the issue of the applicability of § 556(d) of the APA, because of its failure to urge that matter before the Board; indeed, the statute itself states that such objection shall not "be considered by the court." 29 U. S. C. § 160(e) (1970).

V. Even if, Arguendo, § 554(d) of the APA Applies, There Was No Prejudicial Commingling of Judicial and Prosecutorial Functions and Consequently No Reason to Deny Enforcement of the Board Order.

A. At the Time of the § 10(k) Hearing the Hearing Officer Did Not Know He Would Later Be Appointed to Serve in a Prosecuting Role.

The Court of Appeals for the Seventh Circuit concluded that the Board violated § 554(d) of the APA because the hearing officer in the § 10(k) proceeding subsequently served in a prosecutorial capacity at the unfair labor practice hearing. App. 71. Section 554(d) provides that, "[A]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review. . . ." 5 U.S.C. § 554(d).

To overcome the doctrine of harmless error, the court then attempted to demonstrate that this alleged violation of the APA had resulted in harm or prejudice to Local 134. The court sought to find such harm by this reasoning:

> "We think that the *knowledge* on the part of the presiding officer that he will *subsequently* advocate a position based upon his own evidentiary rulings at the § 10(k) hearing could very well influence his decisions at that hearing." (emphasis added) (App. 71.)

The court incorrectly assumed that the hearing officer knew, at the time of the § 10(k) hearing, that he would later be assigned to prosecute an unfair labor practice case against Local 134, but there is absolutely no evidence in the record to support such a conclusion. Indeed, under the scheme of the Act and the Board's established procedures, the hearing officer could not possibly have known at the time of the § 10(k) hearing that he would subsequently be assigned to try such a case against Local 134. He could not have known for each of the following, compelling reasons:

1. The § 10(k) hearing was concluded in March, 1971. At that time, the hearing officer's connection with the case was concluded.

2. The Board itself had to determine whether Local 134 or CWA was entitled to perform the disputed work. At the time of the § 10(k) hearing, the hearing officer could not know whether Local 134 or CWA would be awarded jurisdiction of the work. The Board's decision was handed down on June 30, 1971, long after the hearing officer's connection with the case had terminated.

3. Thereafter Local 134 filed a motion for reconsideration in July, 1971. This was denied.

4. Even at this point, there was no unfair labor practice complaint issued against Local 134. Local 134 had the option of complying with the Board's decision or rejecting it. Not until Local 134 itself elected to reject the Board's decision did the General Counsel issue a complaint, initiating the unfair labor practice trial. The complaint was issued on September 10, 1971. (Only the General Counsel can issue a complaint under the Act, 29 U.S.C. § 153(d).)

5. Only at this point, after the issuance of a complaint, long after the hearing officer's connection with the § 10(k) hearing had terminated, could any of the parties or any of the Board's staff, including the hearing officer, know that there would be an unfair labor practice hearing against Local 134.

7. It was at this time, and not before, that an attorney was selected to prosecute the unfair labor practice complaint against Local 134. By chance, the attorney selected had presided at the § 10(k) hearing. The unfair labor practice hearing was held on November 4, 1971, before an Administrative Law Judge with no previous involvement in the case.

Thus, it is clear that at the time of the § 10(k) proceeding in March, 1971, the hearing officer did not have and could not have had "knowledge" that he would in November "advocate a position based upon his own evidentiary rulings."[2] A noted authority on administrative law has declared:

> "The occasional practice of assigning a single officer to preside at the hearing and to develop the facts becomes harmful only if the officer tries to build a case on one side and then later has to pass upon the extent of his own success." K.C. Davis, 2 *Administrative Law Treatise* § 13.07 (1958).

Significantly, even Local 134 never claimed in its brief or argument in the Court of Appeals that the hearing officer knew at the time of the § 10(k) hearing that he would later be assigned to the unfair labor practice case. Yet, with no foundation in fact, the opinion below attributes such knowledge to the hearing officer and predicates the denial of enforcement on this extraordinary error.

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2. The Court of Appeals relied upon *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950). App. 69-70. That case turns on the judicial bias of a hearing officer who has at once the responsibility of appraising a case and also of seeking to make it as strong as possible. That case is inapplicable to our facts since the § 10(k) hearing officer had no psychological stake in the outcome of the case.

B. Since the Judicial Function Was Fully Neutral and Untainted, There Was No Prejudice to Any Party, and No Justification for Denial of Enforcement of the Board's Order.

It should be noted that Local 134 never claimed, and the Court of Appeals never found any *actual* impropriety in the conduct of the § 10(k) hearing officer. The hypothetical impropriety found by the court is based entirely upon a misunderstanding of the facts. Local 134 was not in fact denied a fair hearing. It was not prejudiced. If Local 134 was not prejudiced, why should the unfair labor practice trial before the Administrative Law Judge, and the decision of the Board all be overturned? Enforcement of a Board order should not be denied for minor mistakes or trivial irregularities. See *NLRB* v. *Mattison Machine Works*, 365 U.S. 123 (1961), where this Court said: "In the absence of proof by the employer that there has been prejudice to the fairness of the election such trivial irregularities of administrative procedure do not afford a basis for denying enforcement to an otherwise valid Board order."

Section 10(a) of the LMRA empowers the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a) (1970). The Board found that an unfair labor practice was committed by Local 134. The Court of Appeals agreed that Local 134 had violated the LMRA. App. 67-68. Since the only stated reason for the court's refusal to enforce the Board's order was a misunderstanding of the facts, and since the alleged commingling of functions, even if it occurred, violated the APA only in a technical and harmless manner without prejudice to any party, the Board's order should be enforced.

CONCLUSION.

We respectfully request that the decision of the Court of Appeals be reversed insofar as it denied enforcement to the Board's order; and that the Board's order be affirmed and enforced.

Respectfully submitted,

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APPENDIX 1.

LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. § 151, et seq. (1970).

29 U.S.C. § 153

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 158(b)(4)(ii)

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

29 U.S.C. § 160

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State of Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it

the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

29 U.S.C. § 160

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith thereupon transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S.C. § 160

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor

practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

29 U.S.C. § 160

(*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injuntive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such

injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organizations and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

APPENDIX 2.

ADMINISTRATIVE PROCEDURE ACT,

5 U.S.C. § 551, et seq. (1970).

5 U.S.C. § 551

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

5 U.S.C. § 554

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

5 U.S.C. § 556

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

APPENDIX 3.

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, SERIES 8, AS AMENDED.

29 C.F.R. § 101.34

SEC. 101.34 HEARING.

If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is non-adversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.